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No. 04-1491

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF MAINE,

Petitioner,

v.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the United States Supreme Court and the Order of this Honorable Court of June 20, 2005, the Respondent in this matter, Joshua Patterson, by and through his counsel, Seth D. Harrow, Esq. and Vafiades, Brountas & Kominsky, LLP, files this Brief in Opposition to the State of Maine's Petition for a Writ of Certiorari Respondent Patterson respectfully asks this Court to deny the petition seeking review of the judgment of the Maine Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is officially reported at 2005 ME 26, 868 A.2d 188. The Order of the Maine District Court granting Patterson's motion to suppress is unreported, but reprinted in full in the State's Petition for Certiorari. (Pet. App. 10-13).

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on February 9, 2005. The jurisdiction for this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

A little after midnight on January 31, 2004, Joshua Patterson, a college-aged individual, was operating a motor vehicle on Munson Road on the campus of the University of Maine. At the same time Officer Nickerson

of the University Police was patrolling that area of the campus and observed a red Saab operated by Patterson. Officer Nickerson observed the Patterson vehicle activate its left turn signal, slow its legal speed in preparation for the turn, and then resume normal speed and deactivate the turn signal. The officer then began to follow the Patterson vehicle which continued to travel down Munson Road at a normal speed and without any erratic or otherwise suspicious operation. At the intersection of Munson Road and College Avenue, the Patterson vehicle stopped appropriately at the stop sign and turned onto College Avenue. The Patterson vehicle then proceeded along College Avenue until it reached the University parking area located at the steam plant where it turned in and parked. The officer acknowledged on the stand that she carefully observed the Patterson vehicle for approximately a mile and saw nothing that would warrant a stop of it or that would otherwise indicate that criminal activity had occurred or was underfoot.

Officer Nickerson then radioed Sergeant Norman who was patrolling in the area in an unmarked car and requested him to observe any further operation of the Patterson vehicle. The sergeant proceeded to the steam plant parking lot and located the red Saab that had been operated by Patterson. The sergeant observed the vehicle for roughly five minutes. It was appropriately parked with cars to either side of it and in front of it. He could see that the engine was still running since the vehicle's exhaust was visible in the cold air. The sergeant speculated that among the various activities that could be occurring inside the red Saab at this time was the consumption of alcoholic beverages or the use of marijuana. However, since the back window of the vehicle had fogged up he could see

nothing inside to substantiate this hunch and, when questioned, admitted that many lawful activities could also be occurring inside the car. During the roughly five minutes the sergeant observed the vehicle at issue, he saw nothing that would indicate that the individuals inside were in need of assistance or that criminal activity had occurred or was underfoot. The sergeant then approached the vehicle and, upon reaching the driver's side window, peered into the car. He was able to see through this window and again saw nothing to indicate criminal activity was occurring or that the occupants had a need for assistance. Despite this, he rapped on the window and orally commanded Patterson to roll it down.

The sergeant was in full uniform at the time and was wearing a weapon that could have been visible. The sergeant indicated that he made it obvious that he expected to speak to Patterson at that time and if Patterson had chosen to ignore him, he would not have walked away. The District Court found it more probable than not that the sergeant's acts and words were perceived by Patterson as a command from the sergeant and not simply a request for communication.

The evidence obtained from this unlawful detention resulted in Patterson's being charged with criminal OUI, 29-A M.R.S.A. § 2411(1) (Class D), as well as Operating after Suspension, 29 M.R.S.A. § 2412-A(1), (3) (Class E), via a Complaint dated February 26, 2004. The undersigned counsel filed a Motion to Suppress the illegally obtained evidence pursuant to M.R.Crim.P. 41A within 21 days of Patterson's arraignment and a hearing was held on that motion on May 26, 2004. Following the hearing, the District Court granted the motion suppressing all evidence as a result of the unlawful search and seizure of Patterson.

The State filed a Motion for Further Findings of Fact and Conclusions of Law which was granted and filed by the District Court on June 29, 2004. The State then appealed the District Court's lawful suppression to the Maine Supreme Judicial Court which upheld the suppression order. The State's Writ for Certiorari seeking review of that decision is now pending in this Court.

REASONS FOR DECLINING REVIEW

There are two compelling reasons why it would be inappropriate under this Court's own guidelines for this matter to be heard. First, the asserted error rests largely on an alleged erroneous factual finding/misapplication of a properly stated rule of law. On this note the State badly and brazenly misstates a key factual finding of the trial court that bears on what issues would be before this Court if the writ for certiorari were granted. Secondly, the decision of the Maine Supreme Judicial Court is in harmony with well established Fourth Amendment jurisprudence of this Court and others.

I. The Asserted Error Rests Largely on an Alleged Erroneous Factual Finding/Misapplication of a Properly Stated Rule of Law.

It is well settled Fourth Amendment jurisprudence that a seizure occurs when an officer, by a show of authority, in some ways restrains a citizen such that he is not free to walk away. *State v. Cilley*, 1998 ME 34, ¶7, 707 A.2d 79, 82; *United States v. Viegas*, 639 F.2d 42, 44 (1st Cir. 1981). Similarly, this Court has stated:

> "[w]e conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, *or the use of language or voice indicating that compliance with the officer's request might by compelled.*" *Id.* (emphasis added).

Here, the trial court, which saw and heard the evidence, correctly found Patterson was seized within the meaning of the Fourth Amendment as he was not free to leave. Of note, the Maine Supreme Judicial Court has repeatedly stated that "the function of an appellate court is not to review a cold transcript and draw its own factual inferences . . . " *Lewisohn v. State*, 433 A.2d 351, 354 (Me. 1981). Rather, the Court's function is to review the record to determine whether there is any evidence to support the trial court's findings. *VanVoorhees v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). Such findings are conclusive under Maine law even if there is evidence in the record that could have supported a contrary determination. *Crowley v. Dubac*, 430 A.2d 549, 551 (Me. 1981).

The factual evidence in the record amply supports this finding which is conclusive on this Court. *Crowley*, 430 A.2d at 551. This evidence includes that the sergeant was in uniform and wearing a weapon; the sergeant initiated the contact under circumstances in which an ordinary person in Patterson's situation expected privacy; the

sergeant rapped on the driver's side window and commanded that it be rolled down; and most importantly, *Patterson perceived the sergeant's acts and words as a command.* (App. at A-5, A-6). This significant finding – that Patterson perceived the sergeant's act to be a command – cannot be said to be clear error based on the record and amply supports the trial court's conclusion that Patterson was seized for Fourth Amendment purposes because he reasonably believed he was not free to ignore the sergeant's command and walk away. The State of Maine, both below in front of the Maine Supreme Court, and here before this Court have attempted to confuse the issue by indicating that the trial court merely found that the officer simply requested Patterson to role down the window rather than commanding him to do so. This statement by the State is simply untrue and contrary to the trial court's decision.

As the Maine Supreme Court wrote, "[t]he record reveals that the trial court was attuned to the significance of Sgt. Norman's statement to Patterson. At the hearing, immediately after listening to Sgt. Norman's testimony, the court identified the issue as whether Patterson 'heard a request, which is . . . no problem or an order which raises questions of a seizure.' The court concluded that based on the officer's conduct, a seizure occurred." (Pet. App. 6-7). The State in alleging that the trial court merely found Patterson was requested to roll down his window focuses in on the trial court's written finding of fact, in which the court wrote that Sgt. Norman "rapped on the driver's side window and requested that the window be rolled down." The Maine Supreme Court correctly saw through the State's argument that this one sentence was taken out of context and made clear in its opinion at footnote 4 (Pet.

App. 7) that it correctly understood that the trial court had in fact determined that the "request" was, in fact, an order that Patterson reasonably believed he could not ignore.

Consistent with Rule 10 of the Rules of this Court further review of this matter should be declined due to the fact that the asserted error by the Petitioner State is simply a factual one/misapplication of a properly stated rule of law.

II. The Decision of the Maine Supreme Judicial Court is in Harmony with Well Established Fourth Amendment Jurisprudence of this Court and Others.

The second compelling reason for this Court to deny certiorari is that the decision of the Maine Supreme Judicial Court in this matter is in harmony with well established Fourth Amendment jurisprudence of this Court and others.

As stated above a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. The trial court's decision in this matter is therefore consistent with the rule of *Mendenhall* as well as Professor LaFave's analysis of this issue in his well-known treatise on search and seizure law. Professor LaFave has indicated "[a] request that the suspect open the door or roll down the window would seem permissible, *but the same would not be true of an order that he do so.*" 4 W. LaFave, *Search & Seizure*, § 9.3(a), p. 107 (1996 & Supp. 2004) (emphasis added); *see also* n. 93 citing collected cases.

Finally, the decision in this matter is consistent with this Court's recent decision set forth in *United States v. Drayton*, 536 U.S. 194 (2002). In *Drayton*, this Court held that a law enforcement officer does not violate the Fourth Amendment by approaching an individual in a public place and asking him questions if he is willing to listen, even if there is no basis for suspecting him of wrongdoing. *Id.* at 200-201. Here, the State did not approach Patterson in a public place; rather the officers approached him while he was in his vehicle, a place where the District Court found an ordinary person in Patterson's situation would have expected privacy. More significantly, the State did not merely approach Patterson and ask a willing listener some questions. Instead, the Sergeant demanded Patterson's attention and commanded him to respond to his inquiry. In fact, this Court in *Drayton* specifically stated: "[t]here was ample grounds for the District court to conclude 'that everything that took place between Officer Lang and [respondents] suggest that it was cooperative' and that there 'was nothing coercive [or] confrontational about the encounter.' There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exists, no threat, no *command*, not even an authoritative one of voice." *Id.* at 204 (emphasis added). Here, the trial court has, as set forth in its opinion, explicitly found the exact opposite – that Patterson reasonably believed he had to cooperate as the sergeant's inquiry was a *command* and not a request for a conversation. Therefore, Patterson reasonably believed he was not free to leave and the trial court's determination that this encounter with the sergeant implicated the Fourth Amendment was entirely consistent with this

Court's and other Court's Fourth Amendment jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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